

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 04-57874 JRG
MARY SARAH VERNON, Chapter 13
Debtor.

MEMORANDUM DECISION IN SUPPORT OF ORDER
SETTING FORTH PROCEDURES FOR RESOLUTION OF DISPUTED ISSUES

I. INTRODUCTION

The court originally issued this Memorandum in tentative form on March 10, 2006. Following a hearing on March 30, 2006, the court issues this Memorandum Decision and files concurrently the order providing for abstention and modification of the automatic stay referred to herein.

Mary Vernon filed a Chapter 7 petition on December 28, 2004. The Chapter 7 case was converted to a case under Chapter 13 on May 3, 2005.

During this bankruptcy case, James McBurney has initiated several proceedings against Vernon, and others, which remain pending in this court. In addition, there is litigation pending between Vernon and

1 McBurney in the state court that preceded the filing of the bankruptcy
2 petition. The various pending matters stem from a relationship that
3 existed between Vernon and McBurney for approximately twenty years.

4 The pending proceedings present a number of issues that need to
5 be resolved before the bankruptcy case can successfully proceed.

6 **II. THE LITIGATION BETWEEN VERNON AND MCBURNEY¹**

7 **A. Litigation Commenced Prior to Bankruptcy.**

8 **1. The Temporary Restraining Order.**

9 In or about July 2004, Vernon reported to the Police Department
10 in Sunnyvale California that she had been raped by McBurney on more
11 than one occasion. Shortly thereafter, on or about July 15, 2004,
12 Vernon obtained a Temporary Restraining Order against McBurney in
13 Santa Cruz County Family Law Case Number FL 019889.

14 Following the issuance of the Temporary Restraining Order an
15 evidentiary hearing was scheduled for September 9, 2004, before the
16 Honorable Jeffrey Almquist. The result of this hearing is not totally
17 clear to this court. McBurney states that the Temporary Restraining
18 Order was terminated following the hearing.

19 **2. The Mutual Restraining Order and Subsequent Appeal.**

20 On or about February 14, 2005, Judge Almquist issued a Mutual
21 Restraining Order in Superior Court Case Number FL 019889. McBurney
22 states that this was done on an ex parte basis.

23 McBurney subsequently appealed the Mutual Restraining Order.

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25 ¹ The facts set forth herein are not intended to constitute findings of fact with
26 respect to specific pieces of litigation between the parties. With respect to matters
27 occurring or pending in the state court, this court does not have copies of the pleadings
28 and has relied on the representations of the parties as to the nature and status of such
matters. As a result, the facts are only relevant to the court's analysis of the
interrelationship between the various proceedings and the court's determination of the manner
in which they can be most expeditiously be resolved.

1 That appeal is pending before the California Sixth District Court of
2 Appeal.

3 **3. The Slander Suit and Vernon's Cross-Complaint.**

4 On or about September 16, 2004, McBurney filed an action for
5 slander, and other causes of action in the Santa Cruz County Superior
6 Court, Superior Court Case Number CV 149889. On November 1, 2004,
7 Vernon filed a cross-complaint in this action based on allegations of
8 sexual assault and defamation. McBurney states the action is
9 presently set for a Case Management Conference on May 1, 2006.

10 **B. Proceedings Commenced Following Bankruptcy.**

11 **1. Vernon's Chapter 7 Case.**

12 On December 28, 2004, Vernon filed her Chapter 7 petition. On
13 February 7, 2005, McBurney filed Adversary Proceeding No. 05-05026.
14 This proceeding seeks to deny Vernon's discharge in total under § 727
15 of the Bankruptcy Code or, alternatively, to deny the debt owed to
16 McBurney under § 523 of the Code. In general, the complaint parallels
17 McBurney's slander action in the state court.

18 **2. Vernon's Chapter 13 Case.**

19 As previously stated the Chapter 7 case was converted to a case
20 under Chapter 13 on May 3, 2005.

21 **a. McBurney's Objection to Confirmation.**

22 On June 20, 2005, McBurney filed his objection the confirmation
23 of Vernon's Chapter 13 Plan. McBurney's objection centers around the
24 debtor's bad faith in filing her bankruptcy and Chapter 13 plan.
25 Central to the objection are the allegations that Vernon has misstated
26 her income in that she has not disclosed that she was receiving money
27 for sex, has failed to disclose various other assets and that she has
28 tried to manipulate the bankruptcy law in such a way as to forum shop

1 for a resolution of the sex-related disputes originally initiated in
2 the state court.

3 **b. McBurney's Proof of Claim.**

4 On June 17, 2005, McBurney filed a Proof of Claim in the amount
5 of \$100,000. The claim parallels his slander action pending in the
6 state court.

7 **c. McBurney v. Vernon, Gromeeko and Worldwide**
8 **Professional Yacht Services.**

9 On October 28, 2005, McBurney filed Adversary Proceeding No. 05-
10 05554. The main thrust of the proceeding is the determination of the
11 slander allegations set forth in the action pending in the state court
12 as well as included in the Proof of Claim.

13 **d. McBurney v. Newport Yacht Management, Tom Rowe,**
14 **Patty Martin and Owner Of The Yacht Massimo.**

15 On November, 11, 2005, McBurney filed Adversary Proceeding No.
16 05-05585. This action involves the nature of Vernon's employment as
17 a first mate on a yacht berthed in Miami, Florida.

18 **III. THE INTERRELATIONSHIP OF THE PROCEEDINGS**

19 The court has examined the overall situation from the perspective
20 of the debtor's attempt to confirm a Chapter 13 plan. McBurney's
21 objection to the Chapter 13 plan is the first issue that must be
22 resolved if the Chapter 13 case is to move forward. Vernon believes
23 a hearing on the objection should take two days. On the other hand,
24 McBurney believes twenty days is required for the hearing. Even if
25 the time for the hearing on McBurney's objections can be reduced
26 substantially, conducting that hearing will not resolve the overall
27 situation.

28 Under the present circumstances, Vernon's cross complaint in the
state court action must also be valued. It appears to be an asset of

1 the estate and, if it has value, will impact the dividend to
2 creditors. The debtor's present plan offers a six cent on the dollar
3 dividend to creditors. If the cross complaint has substantial value
4 then the dividend would likely increase. Vernon must believe that the
5 cross complaint has substantial value - if it did not then McBurney's
6 allegations may well be true and his proof of claim substantiated.

7 There is a further problem that stems from McBurney's \$100,000
8 Proof of Claim. The claim is based on the slander complaint pending
9 in the state court. So far, the debtor has filed no objection to the
10 claim. That may be because the present plan provides only a six cent
11 dividend. However, were the dividend to increase an objection might
12 become necessary. It seems unlikely this issue can be resolved at
13 present. To litigate the claim would simply duplicate what would
14 ordinarily be tried in the state court. If Vernon were to simply
15 stipulate to allow the claim, it would undermine her position and
16 leave her with a determination of debt that would likely survive the
17 dismissal of the bankruptcy.

18 It is clear that trying the objection to confirmation in some
19 limited fashion does not resolve the possible problems facing the
20 debtor in the Chapter 13 case. It would also run the risk of multiple
21 trials of the same or similar issues and the possibility of res
22 judicata or collateral estoppel principles affecting future litigation
23 should such become necessary. It is also clear that a limited hearing
24 on the objection to confirmation fails to resolve the serious issues
25 existing between Vernon and McBurney regarding their twenty year
26 relationship.

27 **IV. THE COURT'S RESOLUTION**

28 In examining all the pending issues it becomes clear that the

1 resolution of the pre-bankruptcy issues stemming from the twenty year
2 relationship between Vernon and McBurney is central to the bankruptcy
3 case moving forward to conclusion. The court has given great thought
4 to the best means by which this can be accomplished in the most
5 orderly and expeditious fashion.

6 **A. The Court's Determination.**

7 The court will modify the automatic stay to permit the parties
8 to return to state court and resolve McBurney's slander suit and
9 Vernon's cross-complaint as well as the issues surrounding the mutual
10 restraining order, including the appeal, and any issues involving the
11 temporary restraining order, if any remain.

12 While the state court is resolving to judgment the above actions,
13 this court will stay the contested matters and adversary proceedings
14 pending in the bankruptcy court. After the state court proceedings
15 are determined, the parties can return to the bankruptcy court and at
16 that point the bankruptcy court will determine what, if any, issues
17 remain to be resolved.

18 The court reached this conclusion based on the following
19 considerations. First, if McBurney's objection to confirmation is
20 litigated prior to resolving the state court litigation, determining
21 the objection to confirmation will create a risk of multiple trials
22 and possible res judicata and collateral estoppel issues, since the
23 objection to confirmation contains aspects of the overall actions in
24 state court, but does not need to address all issues in that
25 litigation. Thus, large portions if not the entire matter would
26 likely need to be retried in the state court. On the other hand,
27 resolution of the state court litigation will likely make a final
28 determination of the nature of the relationship between Vernon and

1 McBurney as well as any rights and liabilities between the parties.
2 Those determinations will likely have preclusive effect in this court
3 and will streamline the litigation in this court. Second, McBurney's
4 proof of claim and his non-dischargeability action against Vernon all
5 involve the same facts and circumstances as the state court
6 litigation. Thus, a final resolution of that litigation by the state
7 court will substantially reduce the litigation needed in this court.
8 Finally, the adversary proceeding regarding the debtor's employment
9 as a first mate in Florida ties in with the objection to confirmation,
10 and can be stayed until the state court litigation is resolved and
11 then a determination can be made as to what, if any, action will need
12 to be taken with respect to that litigation.

13 **B. Legal Authority.**

14 The decision whether to abstain in a certain matter is in the
15 sound discretion of the bankruptcy judge and can be raised by the
16 court on its own motion. In re Costa, 172 B.R. 954, 962-63 (Bankr.
17 E.D. Cal. 1994).

18 "[B]ankruptcy court rulings should impinge on state domestic
19 relations issues 'in the most limited manner possible.'" In re
20 Siragusa, 27 F.3d 406, 408 (9th Cir. 1994) (quoting In re Harrell, 754
21 F.2d 902, 907 (11th Cir. 1985)). While the case before this court is
22 not a normal domestic relations matter, it has several similarities.

23 Where a threshold question of state law is required to be
24 determined before consideration of exclusively bankruptcy questions
25 and there is pending state court litigation on that question, it is
26 appropriate for the bankruptcy court to abstain. In re Owen-Johnson,
27 115 B.R. 254, 257-58 (Bankr. S.D. Cal. 1990) (where the bankruptcy
28 court abstained from determining a motion to reject an executory

1 contract when the threshold question of the existence of the contract
2 was the subject of a pre-petition state court complaint).

3 The court may exercise its discretion to abstain from
4 hearing a proceeding where "judicial economy and the
5 interest of this court in timely and economical
6 adjudication dictate that the cause of action only be heard
7 once". *In re World Financial Services Center, Inc.*, 81
8 B.R. 33, 39 (Bankr. S.D. Cal. 1987). Other factors to be
9 considered in the decision to abstain are whether the
10 resolution of the case involves interpretation of state
11 law, and whether interests of justice and comity prevail.
12 *Id.* at 39.

13 Owen-Johnson, 115 B.R. at 257.

14 **V. CONCLUSION**

15 Based on the foregoing the court will abstain with respect to the
16 matters involved in Santa Cruz County Superior Court Case Number CV
17 149889 and Santa Cruz County Superior Court Case Number FL 019889,
18 including the appeal and any issues involving the temporary
19 restraining order, if any remain. The court also will abstain from
20 any other issues, arising prior to the filing of the bankruptcy on
21 December 28, 2004, that need to be determined to resolve the
22 relationship between Mary Sarah Vernon and James McBurney, and any
23 liability either party has to the other as set forth in the
24 accompanying order. Issues arising from and after the filing of the
25 bankruptcy shall remain to be resolved by this court.

26 DATED: _____

27 _____
28 JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE

1 Case No. 04-57874 JRG

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CERTIFICATE OF MAILING

I, the undersigned, a regularly appointed and qualified Judicial Assistant in the office of the Bankruptcy Judges of the United States Bankruptcy Court for the Northern District of California, San Jose, California hereby certify:

That I, in the performance of my duties as such Judicial Assistant, served a copy of the Court's **MEMORANDUM DECISION IN SUPPORT OF ORDER SETTING FORTH PROCEDURES FOR RESOLUTION OF DISPUTED ISSUES** by depositing it in the United States Mail, First Class, postage prepaid, at San Jose, California on the date shown below, in a sealed envelope addressed as listed below.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____ at San Jose, California.

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